

GAO

United States General Accounting Office

Report to the Honorable
John Glenn, U.S. Senator

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December 1990

EMPLOYEE BENEFITS

Improvements in Enforcement of Insurance Continuation Requirements

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Human Resources Division

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December 18, 1990

The Honorable John Glenn
United States SenateDTIC
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Dear Senator Glenn:

On May 1, 1989, you asked us to review the Department of Labor's and the Internal Revenue Service's (IRS) enforcement of the health insurance continuation requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Specifically, you requested information on their (1) efforts to help private individuals who bring cases of alleged noncompliance by employers to their attention, (2) procedures for investigating these allegations, and (3) enforcement history.

We provided an interim response to you by letter dated January 30, 1990. This report is our final response.

Results in Brief

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Labor and IRS provide limited help to individuals claiming noncompliance with COBRA's health insurance continuation requirements. IRS sends informational material to persons inquiring about continued insurance benefits. This material states that while there are sanctions in the Internal Revenue Code for employers who violate COBRA, the Code provides no remedy for individuals denied benefits. They are told that violations of the Code may also violate laws administered by Labor and to contact Labor if they need additional information. The informational material does not suggest that persons who believe they have been improperly denied benefits notify IRS so it can consider imposing tax penalties.

Labor provides information on benefit entitlement and how to obtain benefits. Labor will also contact employers on behalf of individuals who appear entitled to continued health insurance and advise the employers of their responsibilities. Hundreds of employees and other beneficiaries have been helped through its efforts, according to Labor.

Labor officials believe that most employers will comply when they are made aware of their responsibilities. However, if employers do not comply, Labor will not take enforcement action unless a number of beneficiaries are involved. In cases involving one beneficiary, the person is advised of his or her right to sue. Labor has taken enforcement action against two employers since COBRA's enactment. One case involved four

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employees; the other involved thousands. Both cases resulted in benefits to employees.

IRS refers allegations of noncompliance to its district offices. These offices decide whether to pursue the case to determine whether tax penalties should be imposed. IRS headquarters has received over 100 allegations of violations. In most cases, IRS had not decided whether it would take action on the allegations. In the five cases where IRS had begun action, only one examination was completed. In that case, IRS found no violation.

In this report we are recommending actions by IRS and Labor to help ensure that potential COBRA violations are reported to IRS.

Background

Title X of COBRA amended the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code to require continuing employer-sponsored group health insurance in certain circumstances.¹ Through group health plans, workers and their dependents may obtain hospitalization, physician, and other health services at less cost than they could purchase them individually. Title X was enacted because of congressional concern about many Americans who lack health insurance. Some of them had health insurance but lost it because of job loss, or death of or divorce from the covered worker. Title X was designed to help people in these circumstances.

Title X requires private employers with 20 or more employees that offer a group health insurance plan to provide employees and their families the option of continued coverage if certain qualifying events occur, such as loss of job except for gross misconduct, death of the covered employee, or divorce.

Generally the coverage is to be provided for 18 or 36 months depending on the type of qualifying event. The covered persons can be required to pay up to 102 percent of what would normally be the combined employer/employee cost for the coverage. The Secretary of Labor can take civil action to enforce the continuation requirements. ERISA provides that plan administrators who fail to provide participants and beneficiaries certain notices regarding eligibility or information they

¹Title X also amended the Public Health Service Act to provide coverage to state and local government employees, and coverage was later extended to federal employees. These employees are not discussed in this report.

request may be liable for up to \$100 per day of noncompliance and such other relief as a court may determine proper. In addition, participants or beneficiaries may take civil action to enforce their rights. Title X amended the Internal Revenue Code to deny the deduction of all health insurance expenses for any group health plan unless all the employer's plans met COBRA's continuing coverage requirements. Public Law 100-647, enacted on November 10, 1988, replaced this sanction with an excise tax of \$100 or \$200 (if there is more than one beneficiary for the same qualifying event) per day of noncompliance for each violation. There are also upper and lower limits on the amount of excise tax imposed and provisions for waiver of the tax. In addition, persons other than employers can be liable for the excise tax. For example, an insurer providing coverage under a group health plan can be liable if the insurer fails to comply with an employer's request to make insurance available to a qualified COBRA beneficiary.

The Secretary of Labor was authorized to issue regulations implementing the disclosure and reporting requirements for the health continuation requirements. The Secretary of the Treasury was authorized to issue regulations defining required coverage and premium cost determinations.

On June 26, 1986, Labor issued a model notice summarizing the rights and obligations of employees and their families that employers could use to satisfy the general notification provisions. Labor has no plans to issue additional regulations. Labor is planning to issue a booklet that will provide information on individuals' COBRA rights.

On June 15, 1987, IRS issued proposed regulations related to some health continuation requirements. Additional regulations are being drafted, including those to reflect the revised sanctions and other substantive changes enacted in subsequent legislation. IRS officials advised us that IRS plans to issue these regulations in proposed form as expeditiously as possible but does not currently have an estimated issuance date.

Scope and Methodology

To respond to your request we interviewed officials at Labor and IRS headquarters and obtained data on (1) telephone and written inquiries to these agencies about the health insurance continuation requirements, (2) actions taken on alleged violations of the requirements, and (3) informational materials provided to those who inquired about benefits. We also reviewed Title X of COBRA and its legislative history.

Our review was performed from June 1989 to July 1990 in accordance with generally accepted government auditing standards. As agreed with your office, we obtained only aggregate data on IRS enforcement activity and did not evaluate IRS's decisions on individual cases.

IRS Enforcement of COBRA

IRS estimates that it has received thousands of inquiries from potential beneficiaries regarding COBRA coverage. Those inquiring are usually (1) mailed information on COBRA requirements, (2) told that IRS has no remedy for individuals denied their COBRA rights, and (3) referred to Labor if they need more information. IRS headquarters has identified over 100 potential violations of the health insurance continuation requirements since COBRA was enacted. However, as of March 1990, IRS had begun to investigate only a few of the cases. IRS found no violation in the one investigation that it had completed.

Officials in IRS's Office of Chief Counsel told us in June 1989 that since November 1986, IRS headquarters had received and responded to over 8,000 telephone calls regarding COBRA. They estimated that about half the calls came from people who are or believe they are entitled to coverage. Since early 1988, calls have been answered with a tape recorded message that tells employees to leave their names and addresses if they have questions about COBRA and that IRS will send information on their COBRA rights. Employees are given an address at Labor to which they should write if they have questions after reviewing the information. The message tells employers and plan administrators who need information to leave their names and telephone numbers. A paralegal staff member returns their calls and responds to questions.

The Chief Counsel officials said that since November 1986, they had received and responded to over 1,300 letters regarding COBRA. They said that employers' letters are answered by telephone. Employee letters are responded to with a letter that provides general information on COBRA. The letter includes statements that

- "The Internal Revenue Service answers inquiries of individuals and organizations about their status for tax purposes and the tax consequences of their acts and transactions. COBRA continuation coverage requirements affect the tax liability of employers and certain other individuals or entities.

“Because COBRA continuation requirements have no effect on the tax liability of ‘qualified beneficiaries’ (certain employees and dependents), we are unable to issue you a specific response”

- While there are sanctions for employers who violate COBRA “. . . there is no remedy under the Internal Revenue Code for individuals who have been denied COBRA continuation coverage by employers.”
- Failure to comply with COBRA requirements may violate ERISA, which is administered by Labor.

Employees who need additional information are told to write Labor.

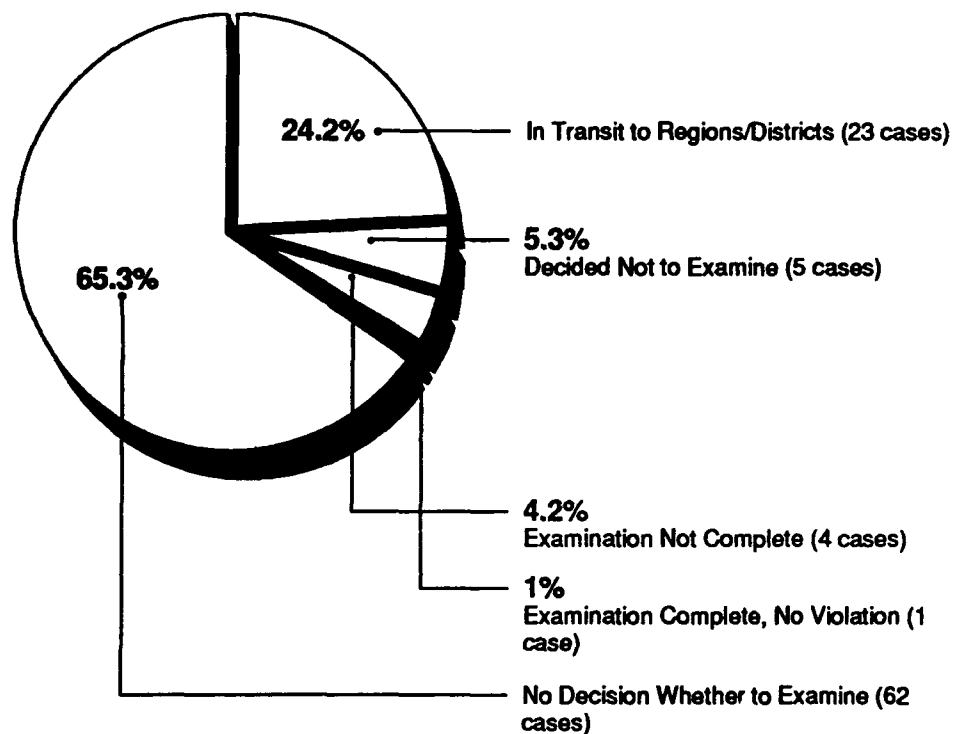
Office of Chief Counsel officials said that, when they become aware of potential violations of COBRA, they refer them to IRS’s Assistant Commissioner (Examination). They estimated that there had been about 90 such referrals as of June 1989.

Officials in the Office of the Assistant Commissioner (Examination) said that they sent these referrals to IRS regional offices, which would refer them to district offices where staff who examine tax returns are located. They said the district offices decided whether to act on these cases and that the actions taken are not summarized or reported to headquarters.

IRS compiled data on these referrals at our request. In March 1990, IRS’s Assistant Commissioner (Examination) told us that since the enactment of COBRA, his office had referred 95 cases to the regions—37 in 1987, 25 in 1988, and 33 in 1989.² IRS had begun examinations for only five of these cases, and only one was completed. IRS determined that there was no violation in the completed examination. See figure 1 for the status of the 95 referred cases.

²He said an additional 19 allegations were being reviewed in his office and would be sent to the regions soon.

**Figure 1: Status of Potential COBRA
Violations Referred to IRS Field Offices**



Labor's Enforcement of COBRA

Labor provides employees and other potential beneficiaries with information on COBRA benefits and how to apply for them. Labor also assists employees in obtaining coverage by calling employers and advising them of their responsibilities. However, Labor will not take enforcement action against employers in cases involving only one beneficiary.

Labor has a unit to handle ERISA inquiries.³ This unit reported that of 23,887 written inquiries received between October 1, 1988, and April 11, 1990, 3,484 were on COBRA. The unit head said that the unit received 42,000 telephone calls from July 1, 1989, through March 30, 1990. Labor does not keep data on what information callers requested. The unit head estimated that a majority of calls were about COBRA. He said that a survey of calls received in April 1990 showed that 51 percent of the calls were about COBRA. He also said that people with COBRA coverage problems tend to telephone rather than write.

³The telephone number of the unit, which is called the Division of Technical Assistance and Inquiries, is (202) 623-8776.

Labor responds to requests for information orally or with written responses and/or informational materials, such as a fact sheet on COBRA's requirements, IRS's proposed COBRA regulations, and a brochure on the procedures for filing a claim under a benefit plan covered by ERISA. The unit head told us that he believed most people did not need help in obtaining benefits once they knew their rights.

Labor will contact employers and advise them of their obligations and the possible penalties for noncompliance. The unit head told us that he believes such contacts usually result in compliance. The unit keeps data on the number of times they helped persons obtain COBRA benefits. These data are based on a form filled out by the Labor employee who provided the assistance. The unit head told us that between October 1988 and March 1990 Labor employees had identified 590 instances where they helped people obtain COBRA benefits. He noted that some cases involved a number of people and sometimes involved large amounts of health benefits.

In addition, he said that there were probably a few instances where employers would not comply with COBRA but he was not aware of any specific cases. Labor does not keep records of cases where employees were not helped. He said he was not aware of any referrals for enforcement action, noting that the unit would not refer a case for enforcement that involved only one beneficiary.

Labor officials responsible for enforcing ERISA said that there are no specific sanctions under ERISA for COBRA violations. The general ERISA enforcement mechanisms apply. They said that Labor does not enforce COBRA in cases involving one person. Individuals who believe they are improperly denied COBRA benefits would be advised of their rights to sue under ERISA. For example, a letter sent to people who inquire about COBRA states:

"Section 502 of Title I of ERISA provides, in relevant part, that a civil action may be brought by a participant or beneficiary 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.' In this regard, if you believe you are improperly being denied benefits or coverage to which you are entitled, you may wish to contact an attorney or a legal aid organization."

Labor has taken legal action in two cases, both involving multiple beneficiaries. One case involved four employees of a subsidiary of Dayton-Hudson Corporation who were allegedly denied coverage because they

were dismissed for gross misconduct. Terminated employees are entitled to coverage except those terminated for gross misconduct. Labor challenged the contention that the terminated employees' actions constituted gross misconduct. Labor reported that on February 21, 1990, a consent order and judgment was entered where the defendants, without admitting or denying the charges, agreed to reimburse the former employees for any uninsured medical expenses.

The second case involved allegations by many striking employees of Eastern Airlines that they had paid insurance premiums but were told by insurance carriers that they were not covered. Labor reported on December 11, 1989, that it obtained a consent order requiring Eastern to provide striking and laid-off employees and their families with the opportunity to obtain continued health benefits under COBRA.

Labor has an enforcement staff of about 200 persons to carry out its ERISA enforcement actions. They are responsible for overseeing about 900,000 pension plans with about \$2 trillion in assets and about 4.5 million welfare plans, such as health insurance plans. In a 1985 report,⁴ we pointed out that Labor's staffing level permitted reviewing less than 1 percent of all plans subject to ERISA. Staff levels have remained about the same since that report.

Conclusions

Both IRS and Labor provide information about COBRA to those who inquire. Also, Labor will contact employers to help employees and other potential beneficiaries obtain benefits. However, if employers refuse to provide benefits, IRS cannot and Labor generally does not take action to compel employers to provide the benefits.

The extent of COBRA violations is unknown. IRS's method of dealing with potential COBRA beneficiaries, in our view, discourages the reporting of violations. We believe it unlikely that people denied COBRA benefits would take the additional effort to notify IRS of violations after reading IRS material that says IRS cannot help them get benefits and refers them to Labor. Neither IRS's taped telephone message nor its informational materials solicit information on violations. Also, being told, in effect, that IRS will not talk to you if you are an employee, in our view, discourages further communication.

⁴Strong Leadership Needed to Improve Management at the Department of Labor (GAO/HRD-86-12, Oct. 21, 1985).

Labor officials believe that the number of employers who violate COBRA once they are made aware of its requirements is small. However, Labor only keeps track of the callers that it helps. People who are told that Labor will not take enforcement action on their behalf are unlikely to keep Labor informed as to their success in obtaining benefits.

Given Labor's limited staffing, we are not proposing that it change its policy of limiting enforcement to cases involving several people. We believe, however, that Labor and IRS should do more to ensure that IRS is made aware of potential COBRA violations. The knowledge that excise taxes may be assessed for these violations could deter such violations. In addition, people referred by IRS to Labor could get assistance quicker if they were given a telephone number as well as an address for Labor.

Recommendations

We recommend that the Secretary of Labor and the Commissioner of Internal Revenue act to encourage people who believe they are improperly denied COBRA benefits to report these denials to IRS. In addition to the informational materials Labor and IRS provide, these actions should include (1) a discussion of the tax consequences of violating COBRA,⁵ (2) a statement that IRS wants to be made aware of possible COBRA violations, and (3) a description of the information that IRS needs to pursue a case. Similar information should be provided to callers who may not be sent this material. The information should make clear that the Internal Revenue Code provides no remedy for individuals who are denied COBRA benefits and that people will need to pursue remedies on their own, such as through lawsuits, to obtain COBRA benefits.

We also recommend that IRS provide people inquiring about COBRA benefits with the telephone number as well as the address of Labor's Division of Technical Assistance and Inquiries, so that those needing further assistance can promptly contact Labor. Inquirers should be advised that there may be difficulty reaching Labor by telephone because of the number of calls, and they should write if their situation is not urgent.

Agency Comments

We did not request written comments on this report. We did, however, discuss matters in it with IRS and Labor officials.

⁵The IRS form letter sent in response to inquiries already contains some discussion of the tax consequences.

Labor officials had no objection to IRS providing Labor's telephone number to inquirers. They expressed concern, however, that Labor was already inundated with COBRA and other ERISA inquiries. They said that if IRS provides Labor's number, it should advise inquirers that because of a heavy telephone work load, it may be difficult to reach Labor by telephone and people should write if their situation is not urgent.

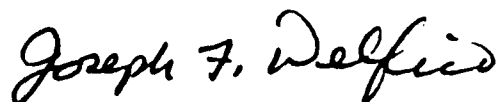
IRS officials said that they had no objection to encouraging people who believe that they have been improperly denied benefits to report the denials to IRS. They believe, however, that it should be made clear to people reporting possible violations that IRS cannot make employers provide COBRA benefits. People who report COBRA violations to IRS will need to continue pursuing COBRA benefits on their own, such as through lawsuits.

We have revised the report to reflect these and other comments by IRS and Labor officials.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 14 days from its date of publication. At that time we will send copies of the report to the Secretary of Labor, the Secretary of the Treasury, and the Commissioner of Internal Revenue. We will also send copies to interested congressional committees and other interested parties, and we will make copies available to others upon request.

If you have any questions concerning this report, please call me on (202) 275-6193. Other major contributors to this report are listed in appendix I.

Sincerely yours,



Joseph F. Delfico
Director, Income Security Issues

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